

CYPRUS WESTERN COAL CO.
(ON JUDICIAL REMAND)

IBLA 92-542

Decided July 11, 1995

Cyprus Western Coal Co., 103 IBLA 218 (1988) vacated and remanded.

1. Coal Leases and Permits: Generally—Mineral Leasing Act: Generally—Regulations: Force and Effect as Law—Regulations: Validity

A clause in a Federal coal lease stating it is issued "pursuant and subject to" all regulations of the Secretary of the Interior "now or hereafter in force" incorporates subsequent regulations relating to diligent development, continuous operations and advanced royalty requirements.

2. Administrative Procedure: Administrative Record—Coal Leases and Permits: Royalties—Mineral Leasing Act: Royalties—Payments: Generally

Where the record is inadequate to determine whether, in fact, appellant met the diligent development requirement under subsequent regulations incorporated in the lease, the matter will be remanded to MMS to compute royalty due.

APPEARANCES: Michael S. McCarthy, Esq., Jo Frances Walsh, Esq., Federico Cheever, Esq., Denver, Colorado, for Cyprus Western Coal, Peter J. Schaumberg, Esq., and Howard W. Chalker, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE KELLY

This case comes to the Board on remand of Cyprus Western Coal Co., 103 IBLA 218 (1988), from the United States District Court for the District of Colorado. Cyprus Western Coal Co. v. Hodel, Civ. No. 88-F-1748 (D. Colo., Nov. 9, 1989). The issue before the court was whether the Board erred in finding that the incorporation clause in appellant's coal lease, which provided that the lease was entered into "subject to the terms and provisions of the * * * [Mineral Leasing Act of 1920, as amended] and to all regulations * * * of the Secretary of the Interior now or hereafter in force," did not supersede the express terms of appellant's lease.

The lease provision at issue is section 6, which requires appellant to pay advance royalties beginning in the sixth year of the lease. Our prior decision held that section 6 requires payment of advance royalties, irrespective of the fact that later regulations enacted by the Department linked the requirement for advance royalty payments to diligent development and continued operations on coal leases.

The court's remand order held that the incorporation clause did, in fact, "incorporate 'all' regulations the Secretary may adopt" (Remand Order at 10), and that "[t]he incorporation clause states that all current regulations or those enacted after the issuance of the lease are made a part thereof" (emphasis in original). *Id.* at 11. The court has remanded the matter to the Board for "further adjudication," and has ordered the Board to consider both Cyprus' additional designation of documents in rendering a decision and any additional documents submitted on remand by MMS pertaining to interpretation of the incorporation clause (Remand Order at 12). We hold that subsequent pertinent regulations are incorporated into the lease by the incorporation clause and remand the case to MMS for recalculation of royalty and interest due.

Factual Background

On April 3, 1975, the Energy Fuels Corporation submitted a mine plan to Geological Survey, then in charge of coal mining operations on Federal lands, describing modifications to a large surface coal mine in Routt County, Colorado. The mine, described as the Energy Mine, was begun in 1962. Proposed modifications of the mine called for expansion into Federal coal leases Colorado 081003, 0128433, and Denver 052547. Pursuant to 30 U.S.C. § 201(b) (1970) (repealed August 4, 1976, by the Federal Coal Leasing Amendments Act), a preference right lease application was filed with the Department for Lease C-0128433, which contained both surface and underground coal reserves.

Although a moratorium had been placed on the issuance of all federal coal leases by the Secretary pending promulgation of long-term coal leasing recommendations, the lease was issued under emergency short-term criteria, approved by then Secretary of the Interior Rogers C. B. Morton by memorandum dated February 13, 1973, in order to avoid disruption of Energy Fuels' existing coal mining operations. Lease No. C-0128433 was issued to Morgan Coal Company effective June 1, 1975, who immediately assigned it to Energy Fuels.

As we stated in our prior decision, the short term leasing criteria permitted coal leasing only when the coal was needed to maintain an existing mining operation, or was needed as a reserve for production in the near future. Cyprus Western Coal Co., *supra* at 219. In addition, the Secretarial memorandum broadly outlined how the Government's interests were to be protected pending implementation of the new leasing program,

and provided that "all coal leases issued will contain terms and production requirements in the form of accumulative advance royalties to assure orderly and timely development" (Memorandum from the Office of the Secretary dated February 8, 1973, at 2).

Accordingly, on June 6, 1975, a memorandum from the Assistant Secretary to the Under Secretary recommended that issuance of the lease be approved with stipulations, effective June 1, 1975. One of the proposed stipulations was ultimately included as section 6 of the lease, which states:

Sec. 6. Advance Royalty. (a) An advance royalty shall be due monthly at the rate set forth in subsection 5(a) based upon the following annual production rates: 10,100 Tons per lease Month for the sixth Lease Year; 15,200 Tons per Lease Month for the seventh Lease Year; 20,200 Tons per Lease Month for the eighth Lease Year; 25,300 Tons per Lease Month for the ninth Lease Year; and 30,300 Tons per Lease Month for the tenth and each succeeding Lease Year.

BLM was well aware of the existence of underground reserves on the lease, the likelihood of a delay in mining the underground reserves, and the potential for collecting advance royalties on those reserves. The Assistant Secretary's June 1975 memorandum noted: "The total amount of recoverable reserves, both underground and strippable, is estimated at approximately 20,000,000 tons." (Emphasis in original.)

The lease itself contains language at section 12(c) that indicates that the United States did not reserve any interest in the underground deposits other than its royalty interest. That section provides, in pertinent part: "The Lessee shall conduct all operations on the Leased Lands in accordance with the provisions of 30 CFR Part 211 and 43 CFR Part 23, whether they are surface or underground mining operations * * *."

In a memorandum dated May 10, 1976, in reference to opposition to its offering of a competitive coal lease (under short term leasing procedures) for surface mining by Energy Fuels on a contiguous lease, C-20900, BLM stated:

While BLM recognizes that recoverable underground coal does exist on C-20900 and on the adjoining issued Federal lease C-0128433, these reserves could not be utilized to meet immediate needs within the next year because of the five-to-seven year lead time required to develop an underground operation.

In that memorandum, BLM also acknowledged that immediate production requirements under Energy Fuels' mining plan were to be met by surface mining leases C-0128433 and C-20900, and that surface mining from two

other leases under the plan, leases D-052547 and C-081330, would take place beginning in 1977.

Modifications to the original mine plan for the Energy Mine were approved by the Area Mining Supervisor, GS, on September 28, 1977. However, the company completed surface mining on the lease by October 1976, before the mine plan was approved. According to Cyprus, approximately \$770,670 in royalties were paid on 904,000 tons of coal produced (Cyprus' Supplemental Report at 3). Under the mine plan, however, the Energy Mine was to be operational on contiguous leases through 1984.

In late 1979, Energy Fuels submitted another mine plan that made reference to the potential for underground coal mining on Lease C-0128433. Cyprus Western Coal Co., supra at 219. On April 28, 1980, Energy Fuels received notice from the Department that, pursuant to section 6 of the lease, advance royalties would be due and payable for the underground reserves on that lease beginning June 1, 1980, which would have begun the 6th lease year. Energy Fuels tendered an offer to relinquish the lease on June 1, 1980, contending that it was neither financially nor technically prepared to mine underground coal on the lease at that time. Id. at 220.

On December 15, 1981, the Deputy Conservation Manager-Mining, Central Region, issued a memorandum to the Leader, Craig Team, Branch of Adjudication, BLM, Denver, recommending rejection of the offer to relinquish as against the public interest in contravention of 43 CFR 3452.1-1 (1981) (now 43 CFR 3452.1-3). Subsequent to a series of corporate restructurings, the offer to relinquish the lease was withdrawn by Energy Fuels' successor, Cyprus Western Coal Company, on December 9, 1981, before final action thereon was taken by the Department. See Cyprus Western Coal Co., supra at 220.

Cyprus then contended before the Department that section 6 of the lease was superseded by new regulations, and that it was never the intent of the parties to apply section 6 of the lease to the underground reserves. The Minerals Management Service (MMS) rejected this interpretation, and on May 27, 1983, ordered payment of the advance royalties. This decision was affirmed first by the Director, MMS, and later by this Board in Cyprus Western Coal Co., supra.

In the meantime, MMS had proposed revised regulations which permitted a lessee to remain under the terms of its pre-1976 lease, unless it elected to be bound by the later regulatory scheme. 30 CFR 211.20(b)(1) (now 43 CFR 3483.1(b)(1)). Cyprus submitted such an election, which was approved by MMS effective April 1, 1983. Cyprus Western Coal Co. at 221. Shortly thereafter, on July 22, 1983, Cyprus submitted an application to the BLM District Manager, Craig District Office, Craig, Colorado, for approval of a logical mining unit (LMU) which included the underground reserves on the 475-acre Lease No. C-0128433 and a 1,120-acre contiguous private lease. This LMU, designated as the Foidel Creek Mine LMU, was never approved, and the "Foidel Creek LMU" became simply the "Foidel Creek Mine Plan."

Cyprus avers that since the Board's 1988 determination in this appeal, it has completed mining the underground reserves on Lease C-0128433 and states that it has paid MMS production royalties in excess of \$2,700,000 (Cyprus Report at 5). Cyprus contends that it has therefore satisfied its royalty obligation, as section 6(b) of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. § 207(b) (1988), provides that advance royalties shall be offset by production royalties. MMS maintains, however, that production royalties cannot be offset until advance royalties have been paid. It has calculated the amount of advance royalties due to be \$1,735,475.26. MMS contends that it is entitled to interest on this amount.

Arguments of the Parties

On August 20, 1992, in accordance with the Memorandum Opinion and Order of the court, the Board ordered each of the parties "to file a report recommending procedures to be followed on judicial remand," and ordering Cyprus Coal "to submit copies of * * * additional documents referenced in the court's remand order."

In its Report filed pursuant to the Board's order, appellant argues that the incorporation clause in the lease renders section 6 of the lease inoperable, and that, under the 1976 regulations, it is not required to pay advance royalties except after diligent development had been achieved, and only then in lieu of "continued operations." Appellant contends that the 1976 regulations did not require diligent development of leases issued prior August 4, 1976, until June 1, 1986; and that the development of the underground coal reserves on the lease matured "later and separately," and were not a "logical mining unit for purposes of diligent development because surface and underground mining on the lease could not be conducted as a unified operation" pursuant to FCLAA and its implementing regulations (Cyprus Report at 8).

With its Report, Cyprus has filed 16 additional documents for the Board's consideration. Eleven of the documents are coal leases issued by the Department between 1964 and 1985 which include, in their initial paragraphs, some form of the "now or hereafter" language. Appellant argued before the District Court that the Department intended that the "now or hereafter" clause in its lease supersede section 6. Appellant now argues before the Board that the court's Memorandum Order requires a finding on remand that the incorporation clause supersedes section 6 of the lease.

In its Answer filed pursuant to the Board's order, MMS has conceded that, except for the period from September 1, 1982, through March 1, 1983, the 1976 BLM coal regulations were incorporated into the lease pursuant to the aforementioned incorporation clause, but argues that those regulations do not relieve Cyprus from the duty to pay advance royalties. MMS maintains that since diligent development was in fact achieved on the lease

between June 1 and August 31, 1976 (Answer at 5, n.1), appellant was required to either continue operations on the lease or pay advance royalties effective with the lease year beginning June 1, 1977. With respect to the period of time between September 1, 1982, and March 1, 1983, MMS argues that appellant was required to pay advance royalties pursuant to section 6 of the lease, because regulations were changed, effective August 30, 1982, to require lessees to elect to be subject to the rules in 43 CFR Part 3480 (then 30 CFR 211.20(b)(1)), and that such election was not made by appellant until March 1, 1983.

In a supplemental pleading filed with the Board on July 8, 1994, Cyprus argues that MMS has misinterpreted the 1976 regulations concerning diligent development, continued operation, and advance royalties. Appellant maintains that underground and surface operations on the lease comprise separate and distinct mining operations, or LMU's, giving rise to two starting points under FCLAA and its regulations for purposes of determining diligent development and continued operations, and for determining whether advance royalty is due and payable.

Citing this Board's decisions in Utah Power & Light Co., 118 IBLA 181, 98 I.D. 97 (1991), and Cordero Mining Co., 121 IBLA 314 (1991), appellant further alleges that continued operation requirements under section 6 of FCLAA are not properly applied where an existing mining plan approved by the Department contemplates a delay in mining due to the vicissitudes of the operation itself.

Appellant further argues in its supplemental statement that, pursuant to FCLAA and regulation 43 CFR 3503.2(b)(1) (1977), the Department was required to make a determination that advance royalties in lieu of continued operation was in the public interest specifically on Lease No. C-0128433, and that, under that regulation, the lessee had the option of consenting to pay advance royalties. Thus, appellant asserts that royalty liability was "allowed only with the mutual consent of the mining supervisor and the lessee" (Appellant's Supplement Statement at 16). Finally, appellant contends in its supplemental statement that 30 U.S.C. § 207(b) (1988) does not provide authority for MMS's assertions that advance royalties must be paid before production royalties can offset them, and that interest is properly chargeable.

In response, MMS contends that the burden was on Cyprus and its predecessors to apply for segregation of the lease, and, since it did not, it is liable for advance royalties for that portion of reserves that it was unable to mine in accordance with continued operation requirements. Citing Western Slope Carbon, Inc., 98 IBLA 198 (1987), MMS maintains that 30 U.S.C. § 207(b) (1988) and its implementing regulations provide only two options for lessees—to maintain continued operation, or to pay advanced royalties.

According to MMS, impossibility of continuing operation does not excuse lessees from paying advance royalties, but rather triggers the requirement to pay them. By making a demand for advance royalties, MMS responds, the Secretary has made it clear to appellant that he deems advance royalties to be in the public interest in this case. Furthermore, MMS maintains, the regulatory scheme does not grant lessees an option of electing to pay advance royalties upon failure to continue operations, but mandates that they do so upon penalty of forfeiture of the lease should they not.

Analysis

[1] The district court held that under the incorporation clause herein, section 6 of the lease was superseded by subsequent regulations promulgated by the Department which bear upon whether and to what extent advance royalties may be collected by the Department. This interpretation is consistent with our holdings in AMCA Coal Leasing, Inc. (On Reconsideration), 114 IBLA 246, 250 (1990), and Veola and Aaron Rasmussen, 109 IBLA 106, 111 (1989) and cases cited therein. We, therefore, vacate our prior decision to the extent that it is inconsistent with the court's opinion and our prior decisions, and hold that the effect of the incorporation provision in the instant case was to make subsequently adopted regulations relating to diligent development, continuous operations and advanced royalty requirements applicable to the lease.

[2] As indicated earlier, MMS does not now challenge the district court's interpretation of section 6, but maintains that advance royalties are due and owing even with application of subsequently adopted regulations because appellant achieved diligent development on the lease by August 1, 1976, and was thereafter responsible for continuous operation on the lease pursuant to the 1976 regulations. For the reasons set forth below, we find the record inadequate to determine whether, in fact, Cyprus met the diligent development requirement under the 1976 regulations.

Under the May 1976 regulations, a lease was the smallest unit of land that could be designated an LMU, and all leases were deemed to be LMU's. 43 CFR 3500.0-5(f). See 41 FR 21780 (May 28, 1976). We therefore reject appellant's contentions that the lease was not an LMU and that the lease contained two separate LMU's, one for the surface reserves and one for the underground reserves. The 1976 regulations are clear that, except where otherwise authorized, a lease shall comprise an LMU. Subsequently adopted regulations have required Departmental approval for creation of an LMU. See, e.g., 30 CFR 211.80(a)(1982); 43 CFR 3487.1(a). The record is clear that BLM did not authorize creation of a separate LMU for the underground reserves, and that the lease was never severed into surface and underground reserves.

Under the applicable regulation, 43 CFR 3500.0-5(f), "diligent development" requires the extraction within any 10-year period after June 1, 1976, of 1/40th of the LMU reserves associated with that lease.

The regulation computing LMU reserves requires comparison of the recoverable reserves with the amount of coal mined. The record before us, however, is not only unclear as to the proper reserve base, it is also unclear with respect to the amount of coal which was mined subsequent to June 1, 1976.

In its Answer to Cyprus' Report on Remand, MMS notes that Cyprus admits that it produced 904,000 tons of coal before 1980, thereby totally depleting the surface deposit (Answer at 5). In footnote 1 on that page, MMS asserts that 706,056 tons were produced prior to June 1, 1976. It then asserts that 269,756 tons were produced between June 1, and August 31, 1976, which represents more than 1/40th of the LMU reserve base calculated by MMS to be 8,793,944 tons as of June 1, 1976. The problem with these figures is that if total production was 904,000 tons of which 706,056 were produced prior to June 1, 1976, production after that date could aggregate no more than 197,944 tons, a figure which would be less than 1/40th of the LMU reserve base.

While MMS never directly addresses the mathematical inconsistency of its argument, an examination of some of the documents found in the case file, while seemingly explaining the source of this confusion, actually raise totally new questions. Various attachments were apparently prepared after the Board's original decision but prior to the Court's remand order exploring options for determining exactly how much money the Government claimed was owed. Attachment 1-1 sets original recoverable reserves at 9,500,000 tons. It then indicates that, consistent with appellant's assertion, 706,056 tons were produced prior to June 1, 1976. It also asserts, as did the Government's answer, that 269,756 tons were produced between June 1, 1976, and August 31, 1976. This attachment also claims that an additional 114,430 tons were produced between September 1, 1976, and October 15, 1976, at which point all production ceased.

The above figures would result in total production of 1,090,242 tons. Appellant, however, alleges that only 904,000 tons were produced. This is a discrepancy of 186,242 tons. Attachment 2-1 actually asserts that this tonnage was produced but never reported to MMS or BLM and that no royalty was ever paid on this production. Yet, MMS does not assert that appellant produced a significant amount of coal for which it never tendered any royalties.

This is a point which must be clarified. If only 904,000 tons were mined, and of this, 706,000 tons were produced before June 1, 1976, there is no theoretical basis on which to assess advance royalty since, given the recoverable reserve base the Government has utilized, appellant would not have achieved diligent development in the mining of the surface coal deposit.

Furthermore, there is confusion in the record with respect to the derivation of the reserve base. In its Answer, MMS uses a LMU reserve

base of 8,793,944 tons as of June 1, 1976. See Answer at 5 n.1. However, in a letter dated August 8, 1979, the Acting Area Mining Supervisor estimated that the lease contained recoverable reserves of 8,350,000 as of that date. See 1986 Statement of Reasons, Exh. 23. Moreover, a March 27, 1980, Recoverable Reserves Report prepared by Energy Fuels (see 1986 Statement of Reasons, Exh. 25), estimated a coal reserve base of 8,179,000 tons with respect to the Fish Creek and Wadge seams. This reserve base increased to 16,793,000 tons if the Wolf Creek seam was added in. It should be noted that this report asserted that none of this coal was properly included in the minable reserve base or as "recoverable" reserves.

The foregoing discussion demonstrates that MMS' theory of recovery is premised on two figures—the amount of coal produced subsequent to June 1, 1976, and the recoverable coal reserves existing at that date—neither of which can be definitively derived from the record presently before the Board. Accordingly, we conclude this case should be remanded to MMS for recalculation of royalty and interest due in a decision appealable to this Board. In its decision, MMS should address the inconsistencies noted above and the legal basis for its calculation.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board's decision in Cyprus Western Coal Co., 103 IBLA 218 (1988) is vacated, and the case is remanded to MMS for action consistent with this opinion.

John H. Kelly
Administrative Judge

We concur.

James L. Bymes
Chief Administrative Judge

James L. Burski
Administrative Judge

